

NOT FOR CITATION
IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

MONICA STEMPLEWSKI,

No. C 10-01507 HRL

Plaintiff,

V.

SUNTRUST MORTGAGE, INC. and DOES
1-10,

**ORDER (1) GRANTING
DEFENDANT'S MOTION TO
DISMISS AND (2) CONTINUING
INITIAL CASE MANAGEMENT
CONFERENCE**

Defendants.

[Re: Docket No. 5]

Plaintiff Monica Stemplewski sought to modify her home mortgage with defendant SunTrust Mortgage, Inc. (“SunTrust”). When that effort failed and SunTrust instigated foreclosure proceedings, she sued SunTrust in state court, alleging five claims: (1) breach of contract, (2) fraud, (3) negligence, (4) intentional tort, and (5) violation of the California Foreclosure Prevention Act (“CFPA”). SunTrust, a Virginia citizen, timely removed the case to federal court on the basis of diversity jurisdiction. SunTrust now moves to dismiss plaintiff’s complaint for failure to state a claim. Plaintiff opposes the motion. Upon consideration of the motion papers and the arguments presented at the hearing, the court GRANTS defendant’s motion.¹

LEGAL STANDARD

On motion, a court may dismiss a complaint for failure to state a claim. Fed. R. Civ. P. 12(b)(6). The federal rules require that a complaint include a “short and plain statement” showing

¹ Pursuant to 28 U.S.C. § 636(c) and Fed. R. Civ. P. 73, all parties have expressly consented that all proceedings in this matter may be heard and finally adjudicated by the undersigned.

1 the plaintiff is entitled to relief. Fed. R. Civ. P. 8(a)(2). The statement must “raise a right to relief
2 above the speculative level.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). As such, only
3 plausible claims for relief will survive a motion to dismiss. *Ashcroft v. Iqbal*, --- U.S. ----, 129 S.
4 Ct. 1937, 1950 (2009). A claim is plausible if its factual content “allows the court to draw the
5 reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* at 1949.

6 DISCUSSION

7 A. Requests for Judicial Notice

8 As an initial matter, both parties request that this court take judicial notice of various
9 documents. A court may take judicial notice of facts that are not subject to reasonable dispute. Fed.
10 R. Evid. 201. Such facts include matters of public record, *Lee v. City of Los Angeles*, 250 F.3d 668,
11 689 (9th Cir. 2001), and legislative history, *Hunt v. Check Recovery Sys., Inc.*, 478 F. Supp. 2d
12 1157, 1160 (N.D. Cal. 2007).

13 The court grants SunTrust’s request for judicial notice of documents recorded in the Office
14 of the Santa Clara County Recorder. (Def. Req. for Judicial Notice Exs. 1–4.) The court also takes
15 judicial notice of the legislative history of California Senate Bill 1137. (Pl. Req. for Judicial Notice
16 Exs. 7–8.) However, the court declines to take judicial notice of communications between plaintiff
17 and SunTrust because these documents are subject to reasonable dispute. (*Id.* at Exs. 1–6.)

18 B. Motion to Dismiss

19 SunTrust’s primary argument in favor of dismissal is that plaintiff’s complaint utterly fails to
20 meet federal pleading standards. It further asserts that even in absence of this critical error, each of
21 plaintiff’s claims suffer from other defects that cannot withstand a motion to dismiss. Stemplewski
22 counters that she has properly stated each of her claims, and provides additional information about
23 each claim in her opposing brief.

24 A review of plaintiff’s complaint supports SunTrust’s assertion. Certainly, one would not
25 expect a plaintiff filing in state court to meet federal pleading standards. Nonetheless, plaintiff’s
26 form complaint fails to allege sufficient facts that would allow this court to reasonably infer that
27 SunTrust is liable to plaintiff as alleged. *Iqbal*, 129 S. Ct. at 1949. For instance, Stemplewski’s
28 breach of contract claim asserts that the parties had an implied contract that required SunTrust to

1 make a good faith effort to modify her mortgage. Yet she fails to allege the conduct that allegedly
2 created such a contract. *See* Cal. Civ. Code § 1621 (“An implied contract is one, the existence and
3 terms of which are manifested by conduct.”). Her fraud claim asserts that SunTrust made false
4 statements to her, but fails to allege what was said, when it was said, and how she was mislead. *See*
5 Fed. R. Civ. P. 9(b) (requiring fraud to be pled with particularity). Her claims for negligence and
6 intentional tort similarly lack facts that would give SunTrust sufficient notice of her allegations, and
7 her claim of a violation of the CFPA cuts off mid-sentence without providing any facts whatsoever.
8 (Compl.) Indeed, plaintiff’s complaint does no more than include “unadorned, the-defendant-
9 unlawfully-harmed-me accusation[s].” *Iqbal*, 129 S. Ct. at 1950 (2009).

10 Plaintiff tries to cure these deficiencies by providing more information about her claims in
11 her opposition brief. A court cannot, however, look to a plaintiff’s opposition when determining the
12 propriety of a motion to dismiss for failure to state a claim. *Broom v. Bogan*, 320 F.3d 1023, 1026
13 n.2 (9th Cir. 2003). In addition, at times her opposition contradicts the claims in her complaint. For
14 example, plaintiff’s complaint alleges a violation of the CFPA, Cal. Civ. Code § 2923.52(a), but
15 repeatedly refers to section 2923.5 in her opposition. As defendants correctly note, section
16 2923.5—which was enacted through Senate Bill 1137—is not part of the CFPA. *See* Cal Civ. Code
17 § 2923.5 (showing that section 2923.5 was enacted a year before the CFPA). Accordingly, the court
18 finds that plaintiff’s complaint, as filed in state court, fails to state claims upon which relief may be
19 granted in federal court.

20 While the court cannot consider Stemplewski’s opposition to determine whether her
21 complaint states a claim, it may consider it for purposes of determining whether to grant plaintiff
22 leave to amend. *Orion Tire Corp. v. Goodyear Tire & Rubber Co.*, 268 F.3d 1133, 1137–38 (9th
23 Cir. 2001). “Complaints may not be dismissed with prejudice unless the allegations of the
24 complaint make clear that plaintiff cannot state a claim.” *Id.* at 1137. The court finds that with one
25 exception, plaintiff’s opposition does not foreclose the possibility that she may be able to state a
26 claim upon amendment of her complaint.²

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28 ² The court observes, however, that several of the defendant’s other grounds for dismissal appear sound. Stemplewski would need to address those issues to have success in any amended complaint.

1 The exception lies with plaintiff's intentional tort claim. Plaintiff's complaint and
2 opposition brief allege conversion on the basis that SunTrust could not conduct foreclosure
3 proceedings without possession of the original note. (*See* Compl.; Opp'n 9.) Yet in California, “[i]t
4 is well-established that non-judicial foreclosures can be commenced without producing the original
5 promissory note.” *Nool v. HomeQ Servicing*, 653 F. Supp. 2d 1047, 1053 (E.D. Cal. 2009); *see also*
6 *Hafiz v. Greenpoint Mortgage Funding, Inc.*, 652 F. Supp. 2d 1039, 1043 (N.D. Cal. 2009).
7 “California law does not require possession of the note as a precondition to non-judicial foreclosure
8 under a deed of trust Pursuant to section 2924(a)(1) of the California Civil Code, the trustee of
9 a Deed of Trust has the right to initiate the foreclosure process. Production of the original note is
10 not required to proceed with a non-judicial foreclosure.” *Pagtalunan v. Reunion Mortgage Inc.*, No.
11 09-00162, 2009 WL 961995, at *1 (N.D. Cal. 2009) (internal citations omitted). Stemplewski
12 provides no other basis for her intentional tort claim. Thus, the court finds that any attempt to
13 amend this claim would be futile.

CONCLUSION

15 || Based on the foregoing:

IT IS SO ORDERED.

25 | Dated: May 26, 2010

HOWARD R. LLOYD
UNITED STATES MAGISTRATE JUDGE

1 **C 10-01507 HRL Notice will be electronically mailed to:**

2 Erik Wayne Kemp ek@severson.com, ano@severson.com, klm@severson.com
3 John B. Sullivan jbs@severson.com
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4 vhn@severson.com

5 **Counsel are responsible for distributing copies of this document to co-counsel who have not
6 registered for e-filing under the court's CM/ECF program.**